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*An Association of
Independent Legal Professionals*

August 13, 2013

Marjorie McDonald, Chairperson
Law and Justice Interim Committee
4111 June Drive
Billings, MT 59106-1565

Sent Via U.S. Mail

Re: Board of Parole and Pardons and DOC issues

Dear Ms. McDonald:

My name is Rob Stephens and I have been engaged in the practice of criminal law in the State of Montana since 1970. Although my practice responsibilities generally do not involve appearances before the Board of Parole and Pardons, I have appeared with enough frequency that I have formed some opinions regarding what I view to be an essentially arbitrary and subjectively unfettered exercise of discretion in Parole Board decisions.

Similarly, based upon my criminal defense practice, I have fairly consistent interaction with State Parole and Probation officers in connection with their monitoring of probationary defendants and parolees. It is my opinion that Department of Corrections has in some instances impaired the ability of probationers and/or parolees to seek and maintain appropriate employment based upon DOC policies restricting supervised persons from securing driver's licenses. I believe that prerelease centers such as Alpha House in Billings are more interested in income generating activities from their supervised prerelease inmates than facilitating their reintegration into the community.

It has also been my experience that a supervising parole or probation officer has the ability, and can, revoke and place sanctions upon a probationer and/or parolee

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Exhibit 1

based upon such subjective observations as "poor attitude", personality conflicts, and personal animus. Due process hearings for probationers and/or parolees (especially parolees) provide little in the way of due process protections. Although my experience is largely anecdotal, it tends to support the proposition that, both the Board of Parole and Pardon's and the DOC's policies regarding supervision of probationers and parolees by its probation officers, have contributed to an unnecessarily large prison population.

As a historical backdrop, I refer your attention to the U.S. Supreme Court Decision in *Board of Pardons v. Allen*, 482 U.S. 369 (1987). The U.S. Supreme Court was construing Montana's statute regarding prisoners eligible for release on parole under the provisions of §46-23-201, MCA. At that time, Montana's parole statute had mandatory language which the Court found created a liberty interest in parole that was protected by the federal constitutional due process clause. The Ninth Circuit in its decision in *Kelly v. Raisley*, 865 F.2d 201 (9th Cir. 1989) subsequently recognized that the protected liberty interest in parole arose because of the mandatory language that the Board "shall" parole a person under certain circumstances. This mandatory language was removed by the Legislature in 1989.

The Montana Supreme Court in two subsequent cases held that parole was a privilege and there was no liberty interest in parole by an inmate. (See, *McDermott v. McDonald*, 305 Mont. 166, 24 P.3d 200 (MT 2001)) However, in *West v. Mahoney*, 305 Mont. 117, 22P.3d 201 (MT 2001), the Montana Supreme Court held that an inmate has due process rights in the parole board hearing itself. These seemingly contradictory decisions can be reconciled by the proposition that the decision in *McDermott v. McDonald* simply recognized that prior to 1989, the date of the amendments to the Montana statute; a Montana inmate would have a protected liberty interest. The decision in *West v. Mahoney* involved a claim that the inmate's rights in the parole process were violated because only one board member heard and signed off on the disposition denying parole. The Court relied heavily upon §46-3-107, MCA (now repealed) that decisions regarding an inmate's parole were to be made by a majority vote of the members of the board of pardons and parole.

It is my belief that the steady erosion of due process protections in the probation

and parole process, which were accomplished through legislative action, are the real underlying culprit and are a significant contributing factor leading to the unnecessary incarceration of Montana inmates.

The arbitrariness of the Board of Parole and Pardons can be exemplified by the Supreme Court decision in *State v. Carson*, 311 Mont. 485, 56 P.3d 844 (MT 2002). I was counsel of record in that case and it involved the denial of an inmate's right to counsel. The Supreme Court stated that the statutory provisions provided for an inmate to have an attorney represent him at parole board proceedings. The Parole Board had denied Carson's attorney the right to represent him because the attorney failed to give proper notice. One of the alarming factors in the case was that the Board could not point to any regulation limiting the inmate's right to counsel. However, more disturbing was the special concurrence of Justice Karla Gray who stated that if the Department of Corrections and/or Board of Parole and Pardons adopted administrative rules and regulations that limited that right that she would be willing to revisit the *Carson* decision and perhaps another result would be appropriate.

I note in passing, the comments of Mike McGee of the Montana Board of Pardons and Parole, quoted in the Billings Gazette, that the committee's interim study is based upon "misinformation and half-truths." It is my perception that the information that is being received is anecdotal, but I challenge the characterization that it is unreliable for purposes of assessing one of the contributing factors of Montana prison overpopulation. Likewise, the quoted statement of Pam Bunke, the head of Adult Probation and Parole, that parole and probation officers are primarily concerned with the safety of the community, begs the real issue of whether or not the Department of Corrections can provide even handed standards for the supervision of probationers and parolees where the protected liberty interests of probationers and parolees have been abolished by legislative fiat.

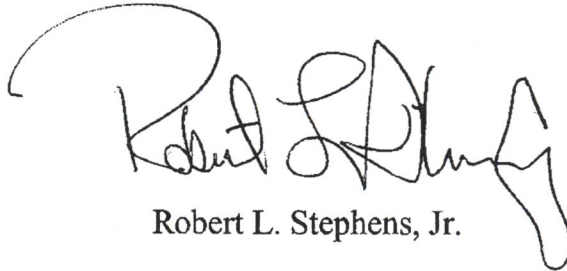
In summary, it is my opinion that one of the causes of Montana's high level of inmate incarceration is a legislatively caused phenomena based upon the Legislature's intentional acts of amending Montana's parole statutes to remove protected liberty interests in and to parole. It would be my recommendation that the Committee address parole statutes to again make parole mandatory subject to certain conditions

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and findings as set out in the current statutory scheme. I hope that you may find my observations and opinions of some use to you during the Committee's study period.

Thank you for your consideration of my views.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Stephens, Jr.", with a large, stylized initial "R" and a long, sweeping underline.

Robert L. Stephens, Jr.

cc: Larry Jent, 201 South 3rd Street, Bozeman, MT 59715-5503
Senator Terry Murphy, Vice Chairman, 893 Boulder Cutoff Road, Cardwell,
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